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No. 07-1586

FILED
JUL 18 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

WALTER C. DUMAS AND DUMAS & ASSOCIATES LAW CORPORATION,

Petitioners,

v.

BARCOSH, LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should grant review where petitioners failed to show that the Fifth Circuit's ruling affirming the district court's granting of Barcosh's motion for summary judgment implicated any of Rule 10's considerations governing review on certiorari.

2. Whether this Court should grant review where petitioners failed to show that the Fifth Circuit's ruling affirming the district court's denial of petitioners' motion for new trial implicates any of Rule 10's considerations governing review on certiorari.

3. Whether this Court should grant review where petitioners failed to show that the Fifth Circuit's ruling affirming the district court's denial of petitioners' motion for relief from judgment implicates any of Rule 10's considerations governing review on certiorari.

4. Whether this Court should grant review where petitioners failed to show that the Fifth Circuit's ruling affirming the district court's grant of Barcosh's motion for temporary restraining order and its motion for preliminary and permanent injunctions implicates any of Rule 10's considerations governing review on certiorari.

5. Whether this Court should grant review where petitioners failed to show that the Fifth Circuit's ruling affirming the district court's issuance of a writ of sequestration implicates any of Rule 10's considerations governing review on certiorari.

6. Whether this Court should grant review where petitioners failed to show that the Fifth Circuit's ruling affirming the district court's granting of Barcosh's Motion for Withdrawal and Release of Funds implicates any of Rule 10's considerations governing review on certiorari.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Barcosh, Ltd. states that Barcosh, Ltd. is a privately held Ohio corporation. It has no parent company and none of its shares are held by a publicly traded company.

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STATEMENT OF THE CASE

Petitioners represented the plaintiff class in a case entitled *In Re Chemical Release at Bogalousa* in the 22nd Judicial District Court in Louisiana. That case settled, and petitioners expected to receive a minimum of one million to three million dollars in attorney fees. Petitioners subsequently entered into two purchase contracts pursuant to which they sold their right to receive the first $113,776.08 and $349,871.69 out of those attorney fees to Core Funding Group, an Ohio company. Both contracts were accompanied by promissory notes and security agreements. The agreements provided for interest, late fees, and attorney fees in the event payment was not made by the maturity date.

Petitioners failed to honor their obligations under the contracts and never made payment. Accordingly, Core Funding Group assigned the contracts and rights thereto to plaintiff Barcosh Ltd. (hereinafter "Barcosh"), an Ohio limited liability company, to pursue collection.

Jack J. Brady, an Ohio attorney, represented Barcosh. The contracts provided that venue and jurisdiction would be proper in Lucas County, Ohio.

Accordingly, Mr. Brady filed suit on Barcosh's behalf in the Lucas County Common Pleas Court, Toledo, Ohio, on February 14, 2006. Walter Dumas and Dumas and Associates Law Corporation (petitioners herein) were named as defendants.

Petitioners were served with the petition on February 21, 2006. In March of 2006, petitioners emailed

Mr. Brady and requested an extension of time within which to answer. Mr. Brady granted an extension until April 5, 2006. However, petitioners failed to file the appropriate stipulation extending the answer date. Therefore, Mr. Brady never changed the due date on his calendar.

Accordingly, Mr. Brady filed a motion for default judgment which was granted on April 4, 2006 ("the April 4th judgment"). Barcosh retained a Baton Rouge attorney, John Anderson, to collect on the April 4th judgment in Louisiana.

I. The 19th JDC Proceedings – The April 4th Judgment

On April 27, 2006, Mr. Anderson filed a petition in the 19th Judicial District Court for the Parish of East Baton Rouge, Louisiana, for recognition and enforcement of the April 4th judgment. On May 3, 2006, petitioners filed a "Petition to Annul Judgment" in the 19th JDC.[1] The petition to annul alleged that the **April 4th judgment** had been taken one day before the extension of time granted by Mr. Brady had elapsed.

Mr. Anderson notified Mr. Brady that he had taken the judgment one day early. Accordingly, on May 11, 2006, Mr. Brady notified petitioners that he would set aside the judgment and permit them to immediately file an answer. Petitioners did not respond to this notice.[2]

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[1] Of course, a Louisiana court has no authority to nullify or vacate the judgment of another state. *Knutsen v. Prince*, 40,109 (La.App. 2 Cir. 9/21/05), 911 So.2d 404, 407.

[2] It is undisputed that petitioners received this notice.

There were no further attempts to execute the April 4th judgment.

On May 23, 2006, Mr. Brady moved in the Ohio court to set aside the April 4th judgment. The Ohio court set aside the judgment, and petitioners were given ten days to answer. That same day, Mr. Brady notified petitioners of the same.

On June 19, 2006, a hearing was conducted in the 19th JDC on petitioners' petition to annul. At that time, all parties stipulated in open court that the 19th JDC action on the April 4th judgment would be dismissed without prejudice. Two judgments of dismissal without prejudice were signed — one on July 3, 2006, and the other on July 10, 2006.[3]

On June 28, 2006, petitioners filed a reconventional demand in the 19th JDC, alleging they incurred damages as a result of the premature April 4th judgment. On August 2, 2006, petitioners filed a motion for summary judgment in the 19th JDC on their petition to annul the April 4th judgment.

However, that judgment had already been voluntarily vacated and set aside. Therefore, Mr. Anderson filed an opposition noting that the April 4th judgment had already been vacated and the 19th JDC suit dismissed by the July 3rd judgment.

On August 21, 2006, petitioners moved to vacate the July 3rd judgment of dismissal. Petitioners asserted that

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[3] Contrary to petitioners' assertions, they received notice of these judgments.

they did not consent to the judgment and that the judgment did not contain language whereby the rights of all parties were reserved. The same day, without notice to Mr. Anderson or a hearing, the 19th JDC judge entered an *ex parte* order vacating the July 3rd judgment.[4]

Subsequently, a hearing on petitioners' motion for summary judgment was conducted on September 22, 2006. The only relief sought by the summary judgment was that the April 4th judgment be nullified. In fact, at the hearing, petitioners' counsel stated that "we're here on a motion for summary judgment to dismiss the petition filed by the plaintiffs." Petitioners' counsel stated further:

> Also they complain – after Mr. Dumas brought it to Barcosh's counsel's attention,

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[4] This type of "strategy" was not new in this litigation. For example, on November 13, 2006, Barcosh filed its opposition to petitioners' motion to dismiss in the federal district court and noted that the July 10th judgment had not been vacated. Remarkably, without notice to counsel for Barcosh, petitioners subsequently filed an "Ex Parte Motion to Vacate and Set-Aside Judgment", which the 19th JDC judge signed on December 5, 2006. That judgment purported to set aside the July 10th judgment. Petitioners attached a copy of that judgment to their Supplemental and Amending Motion to Dismiss in the federal district court. However, it is well settled under Louisiana law that a final judgment is not subject to substantive amendment on motion of the trial court or any party; the appropriate action is a timely application for new trial or timely appeal. La. Code Civ. P. art. 1951; *Titlesite, L.C. v. Webb*, 36,437 (La.App. 2 Cir. 12/11/02) 833 So.2d 1061. Therefore, the December judgment was absolutely null. *See Hebert v. Blue's Auto and Truck Parts*, 2000-2154, p. 9 (La.App. 1 Cir. 12/28/01), 804 So.2d 953, 956.

> Barcosh filed a motion to vacate the judgment. So this motion – the basis for the summary judgment is that it dismiss the ex parte petition to execute foreign judgment filed by Mr. Anderson to enforce the judgment in Ohio. Since the Ohio had been vacated, there is no reason that – you know, there is no reason to have the ex parte petition filed with the court.

Mr. Anderson agreed that the April 4th judgment was taken too soon and noted that the judgment was vacated and the suit ended. The state court judge granted the summary judgment and dismissed Barcosh's petition to enforce **the April 4th judgment** with prejudice. Petitioners were well aware that the judgment rendered on September 22, 2006, only dismissed with prejudice Barcosh's right to pursue enforcement of the April 4th judgment. In fact, at that time the 19th JDC judge made it clear that Barcosh was still entitled to bring a subsequent suit to enforce any other judgment:

> Mr. Anderson: Only one thing, your honor. The judgment says that the claim of Barcosh is dismissed with prejudice.
>
> The Court: In this matter, yeah.
>
> Mr. Dumas: This matter
>
> Mr. Anderson: Well, my question to the court is that our rights are still –

> The Court: Your rights are still your rights. That's right.
>
> Mr. Anderson: All right. And are you saying, your honor –
>
> The Court: But **this suit** is dismissed with prejudice. **That doesn't mean you don't have any rights. You can file your suit to have the foreign court judgment or whatever you want to do, but it may not even land in this division next time.**
>
> . . . .
>
> The Court: But you can't bring this suit back again and that's why I –
>
> Mr. Anderson: On that judgment.
>
> The Court: Yes.

The foregoing facts demonstrate that the only judgment at issue in the 19th JDC proceedings on September 22, 2006, was the April 4th judgment. Through September 22, 2006, the August 3rd Ohio judgment was never mentioned in the 19th JDC.

II. The 22nd JDC Proceedings

On September 28, 2006, Patrick A. Juneau, special master in the *In Re Chemical Release at Bogalusa* case ("the Bogalusa case") filed a Petition for Concursus in the 22nd JDC. R., p. 840, 862. The purpose of the

concursus proceeding was to require Barcosh and petitioners to present their claims against the attorney fees, while simultaneously absolving the special master of any further responsibility as to the funds. The funds were the collateral to the security agreements which were recognized by the August 3, 2006 Ohio judgment.

The funds that had been allocated out of the Bogalusa case to petitioners were deposited in the registry of the 22nd JDC on September 28, 2006. The 22nd JDC judge signed an order requiring the clerk of that court to accept the funds as well as any and all funds allocated to petitioners thereafter.

III. The United States Middle District Proceedings – The August 3, 2006 Judgment

As stated, petitioners did not respond to Mr. Brady's notice that he was setting aside the April 4th judgment and would permit them to immediately file an answer.

The Ohio court set aside the April 4th judgment on May 23, 2006, and gave petitioners ten days to answer. Mr. Brady notified petitioners that same day that the April 4th judgment had been vacated and that petitioners had until June 2, 2006, to file an answer. Petitioners refused to accept Mr. Brady's correspondence and never filed an answer.

On July 13, 2006, Mr. Brady notified petitioners via Federal Express that another motion for default judgment had been filed with the Lucas County Common Pleas Court. Mr. Brady also advised petitioners that a hearing on the matter had been set for August 3, 2006.

Petitioners refused service of the correspondence. Therefore, Mr. Brady sent the correspondence to petitioners via facsimile and U.S. Mail on July 19, 2006. Mr. Brady also forwarded the correspondence to Mr. Anderson, who hand delivered the documents to petitioners on July 24, 2006.

Petitioners refused to answer the suit. On August 3, 2006, the Ohio court rendered judgment against petitioners ("the August 3rd judgment"). The judgment rendered against petitioners became a final, non-appealable judgment.

On August 24, 2006, Barcosh filed a Complaint for Recognition and Enforcement of Foreign Judgment in the United States District Court for the Middle District of Louisiana. The complaint sought recognition of the August 3rd judgment.

Subsequently, petitioners filed a motion for summary judgment on December 11, 2006. The only issue raised in the motion was *res judicata*. Peitioners' motion alleged that the September 22, 2006 19th JDC judgment[5] had dismissed all of Barcosh's claims against them arising out of the purchase contracts. The motion also alleged that the claims, subject matter, and issues set forth in the Complaint for Recognition and Enforcement of Foreign Judgment had been adjudicated in state court and that there were currently proceedings in the 19th JDC involving the same issues.

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[5] The September 22, 2006 19th JDC judgment is the judgment which granted petitioners' motion for summary judgment dismissing Barcosh's suit regarding the April 4th Ohio judgment in the 19th JDC.

Barcosh subsequently filed a motion for summary judgment. Barcosh's motion noted that the subject of the proceedings in the Middle District was the August 3, 2006 Ohio judgment. Barcosh also noted that the Middle District proceedings did not assert a cause of action which arose out of the transaction or occurrence which was the subject of the 19th JDC proceedings.

On April 10, 2007, the district court denied petitioners' motion for summary judgment and granted Barcosh's. On April 17, 2007, the district court issued a final judgment that entitled Barcosh to recognition and enforcement of the August 3rd Ohio judgment.

Notably, on April 23, 2007, petitioners filed a motion to amend and supplement their reconventional demand in the 19th JDC. The motion asserted that the 19th JDC proceedings involved the same subject matter as the August 3rd Ohio judgment and rehashed the very same issues which had recently been ruled upon by the Middle District.

On April 30, 2007, petitioners filed a motion for new trial in federal district court. The motion reasserted *res judicata*.

A hearing in the 19th JDC on petitioners' motion to amend and supplement their reconventional demand was conducted on May 7, 2007. A judgment on petitioners' motion was never issued. *Unsigned* oral reasons for judgment, which were clearly submitted by petitioners, were entered into the record of the 19th JDC on May 15, 2007. Additionally, sometime shortly thereafter, a *proposed* judgment was sent to counsel for

Barcosh by petitioners. That judgment clearly evidenced petitioners' attempts to circumvent the judgment of the Middle District. For example, the judgment included the following gratuitous language:

> IT IS ORDERED, ADJUDGED AND DECREED that any cause of action Barcosh, LTD., may have had against plaintiffs-in-reconvention, Walter C. Dumas and Dumas & Associates Law Corporation, as a result of the August 3, 2006, Ohio judgment, rendered while Barcosh, LTD's Ex Parte Petition for Recognition and Enforcement of Foreign Judgment was pending in this Court but dismissed on September 22, 2006, is barred by *res judicata* and *preclusion by judgment.*[6]

Also, petitioners had previously attempted to obtain an *ex parte* order from the 22nd JDC judge to release the funds being held in the registry of that court. In their *Ex Parte* Motion and Order to Release Funds, petitioners raised the same *res judicata* arguments which were raised in the Middle District. Additionally, on April 3, 2007, petitioners filed a Motion for Summary Judgment/Exception of Res Judicata in the 22nd JDC, reasserting the same arguments which were being addressed by the Middle District.

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[6] The only issue before the 19th JDC judge was whether petitioners should have been allowed to file a supplemental and amending petition. Barcosh notified the 19th JDC judge that Barcosh had not received notice of any ruling by the court and objected to the proposed judgment. The letter noted that the proposed judgment contained rulings on issues that had never been before the 19th JDC.

It was clear that petitioners were attempting to use the state court proceedings to obtain a judgment contrary to the Middle District's and to unlawfully extract the $751,000 in the registry of the 22nd JDC. Therefore, on May 29, 2007, Barcosh filed a Motion for Temporary Restraining Order, Preliminary and Permanent Injunctions, and Writ of Sequestration in the Middle District. The motion requested a temporary restraining order, and preliminary and permanent injunctions, enjoining petitioners from taking any further action in the 19th JDC and 22nd JDC proceedings and enjoining those two proceedings from proceeding any further. The motion also requested a writ of sequestration, directing the United States Marshall for the Middle District of Louisiana and/or the United States Marshall for the Eastern District of Louisiana to seize the $751,000 which was being held in the registry of the 22nd JDC and to deposit those funds in the registry of the Middle District.

Barcosh's belief that petitioners were attempting to collaterally attack the Middle District's judgment was supported by petitioners' subsequent pleadings in that court. For example, on May 30, 2007, petitioners filed a Motion for Relief from Judgment Pursuant to F.R.C.P. Rule 60. The motion alleged that on May 15, 2007, the 19th JDC judge had ruled that the August 3, 2006 Ohio judgment was barred by *res judicata*.[7] The motion attached the unsigned oral reasons for judgment as an exhibit.

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[7] The alleged judgment was only a *proposed* judgment which was never signed.

On May 30, 2007, the district court denied petitioners' motion for new trial and motion for relief from judgment. The district court noted that the 19th JDC proceedings and the proceedings in the district court arose from separate transactions or occurrences, and reiterated that, "No matter how many times defendants restate their res judicata argument, it clearly lacks merit."

The district court also issued an order granting Barcosh a temporary restraining order and issuing a writ of sequestration. The district court found that petitioners were "trying to relitigate factual and legal matters having already been determined and decided by this Court in its Final Judgment and Order . . . dated April 17, 2007." The court also found that irreparable harm would result to Barcosh by having to relitigate those matters in the 19th and 22nd JDC's. The district court further found that petitioners were:

> engaged in a pattern of conduct in which they appear to be attempting to extract monies which constitute the collateral of the plaintiff [Barcosh] from the registry of the 22nd Judicial District Court, State of Louisiana for reasons that appear to be contradictory to the rights of plaintiff and the rights granted to plaintiffs under Judgment render[ed] by this Court, which will cause immediate and irreparable injuries to plaintiff.[8]

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[8] Thus, contrary to petitioners' assertions, the district court's order stated the reasons for issuance of the TRO and set forth why immediate and irreparable injury would be suffered.

Accordingly, the district court granted Barcosh's request for a temporary restraining order and writ of sequestration.

On June 6, 2007, the district court conducted a hearing on Barcosh's Motion for Preliminary and Permanent Injunction. During the hearing, Barcosh submitted records from the 19th JDC and 22nd JDC. Additionally, Barcosh took the testimony of Mr. Jack Brady. Mr. Brady's affidavits of correctness were submitted to the court, which verified the balance due on the contracts as of April 30, 2007. Mr. Brady testified that it was costing Barcosh a substantial amount of money to defend the litigation in the 19th and 22nd JDC's. Mr. Brady also testified that the funds in the registry of the 22nd JDC rightfully belonged to Barcosh, that he feared the funds were at risk, and that if Mr. Dumas succeeded in getting those funds, Barcosh's chance of recovering them was slim.

At the hearing, petitioners took no testimony and only offered into evidence the pleadings which have previously been filed. Petitioners informed the court that they would not submit any additional evidence at a hearing on the permanent injunction. Therefore, Barcosh requested that the district court make the preliminary injunction permanent. Regarding the requirement of a bond, Barcosh pointed out to the court that they were not requesting that the funds be turned over to Barcosh at that time, but only that they be put into the registry of the court.

At the conclusion of the hearing, the district court granted the preliminary and permanent injunctions.

The district court signed a judgment on June 7, 2007, permanently enjoining petitioners from taking any action to extract funds from the registry of the district court or the 22nd JDC. The judgment also enjoined the two state court suits, recognized the writ of sequestration issued on May 30, 2007, and directed the United States Marshal's Office for the Middle District, and to the extent appropriate and/or required by law, the United States Marshal's Office for the Eastern District, to seize and deposit into the registry of the Middle District the funds being held in the 22nd JDC's registry. The judgment ordered the funds to be held until further order of the court and dispensed with the requirement of a bond.[9]

The money in the district court's registry represented attorney fees earned by petitioners in the *In Re: Chemical Release at Bogalusa* case. Those funds were recognized in the August 3, 2006 Ohio state court judgment as funds which were the security for the two loans made to petitioners and which were absolutely, unconditionally, and irrevocably transferred, sold and assigned by petitioners to Core Funding. The Middle District Court's judgment recognized that Ohio judgment.

It had been more than seventy four days since the entry of the district court's April 17, 2007 judgment and more than thirty days since the district court denied petitioners' motion for new trial. At that time, the amount owed to Barcosh by petitioners was $1,180,55.70.

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[9] On June 7, 2007, the district court also issued supplemental reasons for injunctive relief.

Accordingly, on July 5, 2007, Barcosh filed a Motion for Withdrawal and Release of Funds. On July 24, 2007, the motion was granted. The district court ordered that funds being held in the court's registry be released to Barcosh.

On June 27, 2007, petitioners appealed the district court's ruling granting Barcosh's summary judgment and the district court's ruling denying petitioners' motion for a new trial. On June 14, 2007, petitioners appealed the orders granting the temporary restraining order and injunctions and recognizing the writ of sequestration. On August 22, 2007, petitioners appealed the district court's judgment granting Barcosh's Motion for Withdrawal and Release of Funds.

The Fifth Circuit consolidated the appeals. On March 20, 2008, the Fifth Circuit affirmed the district court's rulings. The Fifth Circuit recognized that this case involved "two separate default judgments from the Ohio court, and two separate enforcement actions in Louisiana." The Fifth Circuit rejected petitioners' argument that the Louisiana state court enforcement action and the Middle District enforcement action were based on the same subject matter. *See* Petitioners Appendix., p. 3. The Fifth Circuit further observed that, "the subject matter of an enforcement action is the foreign judgment itself, not the underlying claim that has already been adjudicated." *Id.* Therefore, because this case involves "two distinct judgments," the Fifth Circuit affirmed all rulings of the district court.

Petitioners then filed the instant petition for a writ of certiorari.

REASONS FOR DENYING THE PETITION

Petitioners assert that the ruling of the Fifth Circuit is in conflict with the decisions of this Court and decisions of the Fifth Circuit regarding the application of Louisiana's law on *res judicata*. However, the petition utterly fails to demonstrate how the considerations in Supreme Court Rule 10 are implicated by the rulings of the Fifth Circuit or that the Fifth Circuit's rulings are incorrect. The writ should therefore be denied.

I. Summary Judgment Was Properly Granted

A. Standard of Review

Appellate courts review *de novo* the district court's grant of summary judgment, applying the same standard as the district court. *Smith Intern., Inc. v. Egle Group, LLC*, 490 F.3d 380, 385 (5th Cir. 2007).[10]

B. Barcosh's Suit Was Not Barred by *Res Judicata*

"[A] federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Baker Group, L.C. v.*

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[10] Louisiana law governs a motion for summary judgment enforcing a foreign judgment in a diversity action. *See, e.g., Society of Lloyd's v. Turner*, 303 F.3d 325 (5th Cir. 2002)(applying Texas's procedure for enforcement of a foreign judgment in Texas). In the instant case, Barcosh chose to enforce the Ohio judgment via the Louisiana Enforcement of Foreign Judgments Act, La. R.S. 13:4241, *et seq.*

Burlington Northern and Santa Fe Ry. Co., 228 F.3d 883, 885 (8th Cir. 2000) (citing *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S.Ct. 892 (1984)). "[I]ssues **actually litigated in a state-court proceeding** are entitled to the same preclusive effect in a subsequent federal suit as they enjoy in the courts of the State where the judgment was rendered." *Migra*, 465 U.S. at 81.

Louisiana's *res judicata* statute is La. R.S. 13:4231, which provides in pertinent part:

> Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:
>
> . . . .
>
> (2) If the judgment is in favor of the defendant, all causes of action existing at the time of the final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.
>
> (3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

Under this statute, the central inquiry is whether the second action asserts a cause of action which arises out of the transaction or occurrence which was the subject matter of the first action. *See* La. R.S. 13:4231 (Comment (a)).

Additionally, a second action is precluded only when *all* of the following are satisfied: (1) the judgment is valid; (2) the judgment is final; (3) the parties are the same; (4) the cause or causes of action asserted in the second suit existed at the time of final judgment in the first litigation; and (5) the cause or causes of action asserted in the second suit arose out of the transaction or occurrences that was the subject matter of the first litigation. *Burguieres v. Pollingue*, 02-1385 (La. 2/25/03), 843 So.2d 1049, 1053.

Further, under Louisiana law the burden of proof is on the pleader to establish the essential facts to sustain the plea of *res judicata*. The concept should be rejected when doubt exists as to whether a litigant's substantive rights actually have been previously addressed and finally resolved. *Jones v. Northlake Disposal Services, Co.*, 2002-0076 (La.App. 1 Cir. 12/31/02), 836 So.2d 140, 1143.[11]

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[11] La. C.C.P. art. 425(A) also provides that, "A party shall assert all causes of action arising out of the transaction or occurrence that is the subject matter of the litigation." This statute contains no penalty provision. Rather, it is merely a reference to the principles of *res judicata*. *Gaspard v. Allstate Ins. Co.*, 2004-1502, p. 3 (La.App. 3 Cir. 5/4/05), 903 So.2d 518, 520. All of the elements of *res judicata* must be met before such an exception may be maintained. *Id.*

Petitioners assert that Barcosh's motion for summary judgment should have been denied based upon *res judicata*. Petitioners assert that the claims and subject matter set forth in Barcosh's Complaint for Recognition and Enforcement of Foreign Judgment had been adjudicated in state court. Specifically, petitioners continue to assert that the September 22, 2006 19th JDC judgment dismissed all claims Barcosh had against them. Petitioners continue to fail to recognize that the subject matter of the 19th JDC proceedings was not the August 3rd judgment.

As the district court and Fifth Circuit noted, the validity of the August 3rd judgment was **never** litigated in a Louisiana state court. The **only issue** in the 19th JDC proceedings was whether the petition to enforce the April 4th judgment in Louisiana should be dismissed because the April 4th judgment was taken too soon. The occurrence out of which the cause of action in the 19th JDC arose was the April 4th judgment. The cause of action asserted in the Middle District arose out of the August 3rd judgment, which was not related to the subject matter of the 19th JDC litigation. In fact, Barcosh's suit in the 19th JDC had already been dismissed when the August 3rd judgment was entered in Ohio.[12] Accordingly, the cause of action asserted in the Middle District did not exist at the time of final judgment in the 19th JDC proceedings.

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[12] Petitioners' arguments that the July 3rd and July 10th judgment were invalid was not raised below. Those arguments are also incorrect and certainly do not implicate any of the considerations listed in Supreme Court Rule 10.

It is clear that the September 22, 2006 judgment dismissed only Barcosh's suit to enforce the April 4th judgment. The transactions or occurrences giving rise to the causes of action in the 19th JDC and the Middle District are the April 4th judgment and the August 3rd judgment, respectively, not the purchase contracts. Furthermore, as noted in footnote 4, *supra*, the judgment of September 22, 2006, dismissing Barcosh's claims with prejudice is invalid.

Accordingly, *res judicata* was not applicable and the Fifth Circuit correctly affirmed the district court's granting of Barcosh's motion for summary judgment.[13]

Petitioners have also failed to demonstrate how the Fifth Circuit's ruling implicates any of Rule 10's considerations. The two cases cited by petitioners are not inconsistent with the Fifth Circuit's ruling in this case. In the cases cited by petitioners, *res judicata* was applicable because the second suit arose out of the same underlying claim which had previously been adjudicated. In this case, as the Fifth Circuit noted, the subject matter of the enforcement action in federal court was the August 3rd Ohio judgment, not the April 4th judgment nor the validity of the underlying debt.

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[13] Petitioners argue that the August 3rd Ohio judgment should not apply to Dumas & Associates Law Corporation because Dumas & Associates was not a party to the Ohio suit and is not named in that judgment. However, Dumas & Associates was a party to the promissory notes and clearly a defendant in the Ohio suits. Nevertheless, petitioners never raised this issue in the district court or the Fifth Circuit.

II. Petitioners' Motion for New Trial Was Properly Denied

Appellate courts review the denial of a motion for new trial for abuse of discretion. *Dresser-Rand Co. v. Virtual Automation Inc.*, 361 F.3d 831, 839 (5th Cir. 2004).

Motions for a new trial or to alter or amend a judgment must clearly establish either a manifest error of law or fact or must present newly discovered evidence. *Turner v. Baylor Richardson Med. Center*, 476 F.3d 337, 344 -345 (5th Cir. 2007). These motions cannot be used to raise arguments which could, and should, have been made before the judgment issued. Moreover, they cannot be used to argue a case under a new legal theory.

In this case, petitioners' motion for new trial failed to establish manifest error of law or fact. Additionally, petitioners' motion for new trial simply parroted the arguments that it had previously made and the district court had repeatedly rejected.

Furthermore, petitioners writ seems to assert, for the first time, that a motion for new trial should have been granted because Dumas and Associates Law Corporation was not a party to any suit nor any judgment rendered in the State of Ohio. Petitioners never raised this issue at the district court or appellate level. Also, as previously noted, Dumas and Associates was a party to the promissory notes and a defendant in the Ohio suits.

Accordingly, the Fifth Circuit correctly affirmed the district court's denial of petitioners' motion for new trial. Furthermore, petitioners have failed to assert how the Fifth Circuit's ruling affirming the district court on this issue implicates any of the considerations in Rule 10.

III. Petitioners' Motion For Relief From Judgment Was Properly Denied

Petitioners observe that Fed. R. Civ. P. 60 provides that a court may relieve a party from a final judgment where the judgment is void or where it is no longer equitable that the judgment should have prospective application.

Petitioners assert that the district court's April 17, 2007 judgment is void. However, other than their *res judicata* arguments, petitioners have not explained why.

To the extent that petitioners imply that there was a lack of due process and lack of jurisdiction over the subject matter and petitioners, such arguments are without merit.

Louisiana courts must give full faith and credit to judgments of courts in sister states unless the foreign forum lacked jurisdiction over the litigants or over the subject matter involved in the controversy. *Winston v. Millaud*, 2005-0338, p. 8 (La.App. 4 Cir. 4/12/06), 930 So.2d 144, 151. The relevant law to determine whether the foreign court had jurisdiction is the law of the forum state rendering the original judgment. *Dodge & Ringer v. Salazar*, 556 So.2d 1357, 1360 (La.App. 5 Cir. 1990).

Petitioners had proper notice of the motion for default pursuant to which the August 3, 2006 judgment was rendered.[14] Petitioners had notice of the order setting aside the April 4th judgment.[15] Moreover, petitioners' allegation that they received no notice from the court indicating that they had to file an answer within ten days of May 23, 2006, is irrelevant. Petitioners were served with the initial petition and ordered by the court at that time to answer. They failed to do so.[16] Due process requires nothing further.[17]

Also, the purchase contracts unequivocally stated that jurisdiction would be proper in Ohio and that Ohio law would govern. Petitioners consented to the jurisdiction of the Ohio courts and were properly

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[14] In Ohio, as in Louisiana, every pleading subsequent to the initial petition may be served by mail, facsimile, or personal delivery. *See* Ohio Civ. R. Rule 5.

[15] It should be noted that petitioners admitted on numerous occasions in the 19th Judicial District Court that service of process of the Ohio complaint was made on petitioners.

[16] Petitioners also failed to submit any affidavits to the district court in support of their allegations that notice was lacking.

[17] Furthermore, although service of process was made on petitioners in the Ohio state court proceedings, it was not required. Dumas on his own behalf and on behalf of Dumas & Associates Law Corporation waived the requirement and necessity of service by his signature to the promissory notes themselves. Each note provided, in capital letters and bold print, that petitioners were giving up their rights to service and notice.

served.[18] Petitioners chose not to take any steps in the defense of the Ohio lawsuit and to risk a default judgment being rendered against them, which it was. Therefore, like petitioners' claim of *res judicata*, any claims of due process violations or lack of jurisdiction are not supported by the facts of the case or the applicable law.

Accordingly, the Fifth Circuit correctly affirmed the district court's denial of petitioners' motion for relief from judgment. Petitioners completely failed to assert how the Fifth Circuit's ruling affirming the district court on this issue implicates any of the considerations in Rule 10.

IV. The Temporary Restraining Order and Preliminary and Permanent Injunctions

Petitioners assert that the district court erred in granting the TRO. However, the grant of a temporary restraining order is not appealable. *In re L. Lieb*, 915 F.2d 180, 183 (5th Cir. 1990). Additionally, contrary to petitioners' unsupported assertions,[19] the district court

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[18] In Ohio, when a commercial agreement contains a valid forum-selection clause, a minimum-contacts analysis is not appropriate because the parties have waived the due-process/minimum contacts requirement for personal jurisdiction by way of the forum-selection clause and have consented to the jurisdiction of the court system specified in the clause. *Preferred Capital, Inc. v. Power Engineering Grp.*, 163 Ohio.App.3d 522, 839 N.E.2d 416, 424 (2005).

[19] Barcosh notes that petitioners have failed to include in their application a number of the rulings and orders at issue herein.

set forth in the TRO the reasons for its issuance. Barcosh's affidavit also set forth the facts which showed the risk of immediate and irreparable injury.

"[T]he ultimate decision whether to grant or deny a preliminary injunction is reviewed only for abuse of discretion." *Speaks v. Kruse*, 445 F.3d 396, 399 (5th Cir. 2006). An appellate court reviews a district court's grant of a permanent injunction under the abuse of discretion standard. *Staley v. Harris County, Texas*, 461 F.3d 504, 508 (5th Cir. 2006).

A preliminary or permanent injunction should issue if the movant establishes: (1) a substantial likelihood of and/or success on the merits; (2) a substantial threat of irreparable injury if the injunction is not issued; (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted; and (4) that the grant of an injunction will not disserve the public interest. *Speaks*, 445 F.3d at 400; *See VRC, L.L.C. v. City of Dallas*, 460 F.3d 607, 611 (5th Cir. 2006).

The Anti-Injunction Act generally prohibits federal courts from interfering with proceedings in state courts. 28 U.S.C. § 2283 (2004). However, there are exceptions to this rule. In *Vines v. University of Louisiana at Monroe*, 398 F.3d 700 (5th Cir. 2005), the court considered a situation similar to the instant case. In *Vines*, the Court observed:

> The Anti-Injunction Act generally prohibits federal courts from interfering with proceedings in state court. 28 U.S.C. § 2283

> (2004). There are only three specific circumstances in which a federal court can enjoin a state court proceeding, when it is: (1) expressly authorized by a federal statute; (2) necessary to assert jurisdiction; or (3) necessary to protect or effectuate a prior judgment by a federal court. *Id.*; *St. Paul Mercury Ins. Co.*, 332 F. 3d at 308-09. The third exception is referred to as the "relitigation" exception. "The relitigation exception was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court. It is founded in the well-recognized concepts of res judicata and collateral estoppel." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147, 108 S. Ct. 1684, 100 L. Ed.2d 127 (1988).

A four-part test has been adopted by the federal courts in determining whether the relitigation exception is applicable in a given case. First, the parties in a later action must be identical to (or at least in privity with) the parties in a prior action. Second, the judgment in the prior action must have been rendered by a court of competent jurisdiction. Third, the prior action must have concluded with a final judgment on the merits. Fourth, the same claim or cause of action must be involved in both suits. *Id.* at pp. 704 - 705; *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147 (1988); *N.Y. Life Ins. Co. v. Gillispie*, 203 F.3d 384, 387 (5th Cir. 2000). The relitigation exception is founded in the well-recognized concepts of *res judicata* and collateral estoppel. *Chick Kam Choo*, 486 U.S. at 147.

In this case, as both of the lower courts found, there is no serious dispute that the state court proceedings involved the same parties as the Middle District proceedings. There was also no contention that the court lacked jurisdiction. Accordingly, the first two elements of the relitigation exception were satisfied.

The third element was likewise satisfied. As the district court observed, it had entered judgment on April 17, 2007, which entitled Barcosh to recognition and enforcement of the August 3rd judgment against petitioners. Although petitioners had filed a motion for new trial, the district court had denied the motion prior to entering the injunctions. Moreover, for purposes of issue preclusion, final judgment includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect. *Recoveredge L.P., v. Pentecost*, 44 F.3d 1284, 1295 (5th Cir. 1995) (citing Restatement (Second) of Judgments § 13 (1982)).

The fourth element of the relitigation exception was also satisfied. At the district court level, it was clear petitioners were arguing that the 19th JDC judge intended to "annul" the district court's April 17, 2007 judgment as well as the August 3rd Ohio judgment. As the district court aptly noted, the 19th JDC judge's oral reasons indicated that she intended to rule in direct contravention of the district court and find that the August 3rd Ohio judgment was unenforceable. Also, the 22nd JDC proceeding involved Barcosh's entitlement to the funds, which were collateral to the Barcosh security agreements which were recognized by the August 3rd

Ohio judgment. The lower courts also correctly found that the August 3, 2006 Ohio judgment was the central issue in all three courts.

Accordingly, all four elements of the relitigation exception were satisfied in this case.

Additionally, all four requirements for the issuance of a preliminary and permanent injunction were met.

Barcosh proved its case on the merits before either the preliminary or permanent injunctions were issued. Petitioners assert that there was no need for an injunction since their motion for new trial had been denied. Petitioners miss the point. It was clear that a substantial threat of irreparable injury existed if an injunction would not have been issued. As the district court held, immediate and irreparable injury would result if Barcosh was forced to repeatedly defend claims that were barred by *res judicata*. Under the relitigation exception to the Anti-Injunction Act, "courts have repeatedly held that immediate and irreparable injury results from having to defend claims that should be barred." *See Duffy & McGovern Accommodation Services v. QCI Marine Offshore, Inc.*, 448 F.3d 825 (5th Cir. 2006); *Santo Padre v. Pelican Homestead Savings Assoc.*, 749 F.Supp. 124, 126-27 (E.D.La. 1990), aff'd 937 F.2d 268 (5th Cir. 1991).

Furthermore, the risk of irreparable injury was especially great because petitioners had not only granted Barcosh a security interest in the funds, but had actually made an absolute assignment of the ownership of those funds to Barcosh.

The district court also correctly found that the threatened injury to petitioners was outweighed by any damage that an injunction would cause them. This finding is bolstered by the fact that Barcosh was clearly entitled to the funds in the 22nd JDC.

Lastly, the granting of the injunction did not disserve the public interest. As the district court astutely observed, the injunction only served the public interest by assuring that Barcosh, as the winner in federal court, was not deprived of the fruits of its victory by a later contrary state judgment which may or may not have been reviewable.

Based on the foregoing, the Fifth Circuit correctly affirmed the district court's issuance of the preliminary and permanent injunctions.[20] Petitioners have failed to show how that ruling implicates any of the considerations in Rule 10.

V. Funds Were Properly Released

Petitioners argue that the funds in the registry of the Middle District were not subject to any judgments or orders issued by the district court. Petitioners also argue that the Middle District's rulings did not make Barcosh the owner of the funds.

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[20] The district court properly converted the hearing on the preliminary injunction to a permanent injunction. *See* Fed. R. Civ. P. 65(a), which provides that, "[b]efore or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. . . ."

However, the district court's April 17, 2007 judgment recognized the August 3, 2006 Ohio state court judgment. The Ohio state court judgment, and thus the district court's judgment, recognized that the funds which were in the registry of the district court belonged to Barcosh.

It has long been the rule of law that money, when deposited, becomes in law the property of the party entitled to it, and subject to the disposal of the court. *See, e.g., United States v. 15.3 Acres of Land*, 158 F. Supp. 122, 124 (M.D.Pa. 1957). Funds deposited in the registry of a federal district court are *in custodia legis*. As such, the district court's control over the funds is virtually supreme. *United States v. Rubenstein*, 971 F.2d 288, 294 (9th Cir. 1992).

It is further well settled that property *in custodia legis* may be subjected to process or lien at the discretion of the court having custody thereof. *Bank of Hawaii v. Benchwick*, 249 F. Supp. 74, 80 (D.C.Hi. 1966).

28 U.S.C. § 2042 provides, in pertinent part, that, "[n]o money deposited under Section 2041 of this title shall be withdrawn except *by order* of court." (emphasis added). Pursuant to 28 U.S.C. §§ 2041[21] and 2042, the

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[21] 28 U.S.C. § 2041 provides, in pertinent part:

> All moneys paid into any court of the United States, or received by the officers thereof, in any case pending or adjudicated in such court, shall be forthwith deposited with the Treasurer of the United States or a designated depositary, in the name and to the credit of such court.

district court had discretion to release the funds in the registry of the court to Barcosh and the funds were properly released upon the district court's order.

Pursuant to Fed. Rule Civ. P. 69 and La. Code Civ. P. art. 2252, Barcosh had proceeded with execution of its judgment, and the funds were deposited in the registry of the district court.[22] It had been more than seventy four days since the entry of the district court's April 17, 2007 judgment granting Barcosh's motion for summary judgment and more than thirty days since the district court denied petitioners' motion for new trial. No stay of execution or supersedeas bond was ever filed by petitioners. Therefore, Barcosh was entitled to proceed with having the funds released to it.[23] Because Barcosh had proven that it was the rightful owner of the funds, it was within the district court's discretion to release those funds to Barcosh.

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[22] Fed. R. Civ. P. 69 provides that, "the procedure on execution – and in proceedings supplementary to and in aid of judgment or execution – must accord with the procedure of the state where the court is located. . . ." La. Code Civ. P. art. 2252 provides that, "[a] judgment creditor may proceed with the execution of a judgment only after the delay for a suspensive appeal therefrom has elapsed. . . ." La. Code Civ. P. art. 2123 provides that the delay for a suspensive appeal is 30 days from the date a motion for new trial is denied.

[23] Despite the taking of an appeal, a judgment creditor retains its rights in the judgment and the issuing court retains its jurisdiction to enforce the judgment until a supersedeas bond is posted or a stay granted. *Printing and Paper Trades Auxiliary Workers v. Cuneo Eastern Press, Inc. of Penn.*, 72 F.R.D. 588 (E.D.Pa. 1976); *see, e.g., Sheldon v. Munford, Inc.*, 128 F.R.D. 663 (N.D.In. 1989).

Therefore, the Fifth Circuit correctly held that the district court properly released the funds to Barcosh. Petitioners have failed to show how the Fifth Circuit's ruling implicates any of the considerations in Rule 10.

CONCLUSION

Based on the foregoing, Barcosh asserts that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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